United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,
Petitioner-Appellee,

v.

FIRST NATIONAL CITY BANK,
Respondent-Appellant,

and

MILTON F. MEISSNER,
Proposed Intervenor-Appellant.

BRIEF OF RESPONDENT-APPELLANT FIRST NATIONAL CITY BANK

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Statement

This is an appeal from an order of the United States District Court, Southern District of New York (MacMahon, J.), dated January 27, 1975, which directs First National City Bank ("Citibank") to allow the Internal Revenue Service ("IRS") access to a safe deposit box leased to one of its customers; requires Citibank actively to participate in inventorying the contents of the box, to file a written inventory with the court and to retain possession of items not seized by the IRS subject to the further order of the District Court (24a-25a).*

* Numbers in parentheses refer to pages of the Appendix.

On April 10, 1974 Citibank was served with a Notice of Levy and Notice of Seizure pursuant to which petitioner levied upon all property of taxpayers, Milton F. and Lula Ann Meissner, in Citibank's possession (15a-16a).

Citibank holds no property or rights to property of the taxpayers.

Citibank is in the business of leasing safe deposit boxes and it leases a certain safe deposit box to Milton F. Meissner ("Meissner"). It has agreed with the lessee not to permit access to said box except to the lessee or his deputy (18a).

Petitioner proceeded in the District Court on 11 days' notice, by order to show cause, directing Citibank to show why agents of the IRS should not be permitted to have access to the safe deposit box leased to Meissner to examine the contents (8a-9a).*

On the return of the order to show cause, Meissner sought leave to intervene (20a-23a). His application was denied (6a) and he is not a party to this proceeding.

Questions Involved

1. Is a bank in possession of the contents of a safe deposit box which it leases to its customer where the lessee has the exclusive right of access to the box?

2. Is the lessee an indispensable party to any proceeding where access by a third party is sought?

3. Is there an action pending between petitioner-appellee and respondent-appellant?

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* As of the date of filing this brief, the box has been broken into by the IRS, the contents inventoried and the inventory filed with the District Court. The contents are presently being held subject to further order of the court.

4. Can a court legally order the bank to allow a third party to break into the box, to conduct an inventory and to maintain possession of the contents subject to further order of the court?

Summary of Argument

The District Court had no right to conscript Citibank's aid in giving the IRS access to the safe deposit box where the bank itself had no right of access and, indeed, had expressly agreed with its customer not to permit access except to the lessee or his authorized deputy. This error was compounded by the denial of Meissner's motion to intervene despite the fact that he is the party with the sole right of access and, therefore, is an indispensable party to these proceedings. In addition, it is well established that a plenary civil action is mandated and it was, therefore, error for the court below to have granted the relief sought by petitioner in the context of a summary proceeding.

I.

Respondent holds no property or rights to property of Meissner.

The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether the taxpayer has any property to which the tax lien can attach and whether the defendant is in possession of it. In answering this question the federal courts must look to state law. As stated by the Supreme Court in *Aquilino* v. *United States*, 363 U.S. 509 (1960):

> "The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could

> attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.'" *Id.* at 512-513.

Citibank is established and has its principal place of business in New York (11a, 17a). Also, the safe deposit box which is the subject of these proceedings is located in one of the bank's branches in this state (12a, 17a). Accordingly, it is clear that New York law applies in determining the nature of the relation between the bank and its lessee.

In a leading New York case, in which suit was brought against a safe deposit company to recover a penalty under the Tax Law for defendant's alleged failure to forbid access to a safe deposit box by the survivor of joint lessees, who had allegedly removed certain securities therefrom, the court disallowed the penalty, noting:

> "It is not necessary for us to resort to the rule of strict construction, applicable to statutes under which penalties are sought to be enforced, for in no legal sense can the defendant be said to have had 'possession' or 'control' of any of Sage's securities. In a limited sense, it had the custody of such securities because of the relation which it occupied to the safe in which they were contained. Having neither 'possession' nor 'control' of the securities, the statute imposed no duty whatsoever upon the defendant, nor could it have obeyed the statute without invading the legal rights of its customer. The relation between the defendant and its customer, whether in this case he be regarded as Osborne and Sage jointly or severally, may have some elements comparable to those in a case of bailment, but the legal status of the parties seems to me to bear a closer analogy to that arising from the relation which

> exists between tenants of a general office building and the landlord thereof, who keeps within his control and under his care and protection the common means of access to the building and to the suites of offices therein, but as to which, subject to any regulations that may have been established by the landlord, the rights of the tenant are exclusive.
>
> So far as I can see, the defendant in this case had no more 'possession' of or 'control' over the securities contained in the box in question than such a landlord has over securities contained in a safe belonging to one of his tenants and contained in the private office of the latter." *People* v. *Mercantile Safe Deposit Co.*, 159 App.Div. 98, 101-102 (1st Dept. 1913).

People v. *Mercantile Safe Deposit Co.* was cited with approval by the New York Court of Appeals in *Carples* v. *Cumberland Coal & Iron Co.*, 240 N.Y. 187 (1925), where the court stated:

> "While the status of the Safe Deposit Company is, therefore, in some aspects that of a bailee, the customer's control and possession of his box is not much different than would be the control and possession by a tenant of property in an office which he had rented from the owner of the building. (*National Safe Deposit Co.* v. *Stead, supra; Moller* v. *Lincoln Safe Deposit Co.*, 174 App.Div. 458; *People* v. *Mercantile Safe Deposit Co.*, 159 App.Div. 98, 101, 102.)" *Id.* at 192.

Moreover, the government concedes that the nature of the relationship is lessor-lessee; it characterized the relationship in those precise terms in its moving papers (8a, 12a).

Since Citibank did not hold any property or rights to property of Meissner, the District Court acted without authority in ordering the bank, against its wishes, to act for

the government in breaking into the safe deposit box. Such a direction deprives Citibank of its rights under the Thirteenth and Fourteenth Amendments to the United States Constitution.

II.

The lessee is an indispensable party to this proceeding.

As set forth in the answer to the petition, Citibank has no right of access to the safe deposit box, and has expressly agreed with the lessee not to permit access thereto except to the lessee or his deputy.

In *Shields* v. *Barrow*, 58 U.S. 129, 139 (1854), indispensable parties were defined as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The lessee is an indispensable party because he is the only one who has the right of access to the safe deposit box, and is clearly the one whose interest will be most directly affected by the decree. *Green* v. *Brophy*, 110 F.2d 539 (D.C. Cir. 1940).

Practically the identical fact situation to the case at bar was presented to this Court in the case of *United States* v. *Guterma*, 272 F.2d 344 (2d Cir. 1959), although arising in a different procedural context. There, Guterma kept certain of his records in a safe in an office of the F. L. Jacobs Co. ("Jacobs"), with the right of access exclusively in Guterma and one other individual except, as the Court observed, for ". . . experts in the art of safecracking . . .". *Id.* at 345. A grand jury sub-

poena was served on Jacobs calling for the production of certain of defendant's records kept in the safe and Guterma moved to quash. Jacobs, the custodian of the safe, was not a party to that proceeding, as, indeed, it need not have been; nor, in the case at bar, was Citibank a necessary or proper party either to the proceeding or to the break-in. In any event, in deciding whether Guterma had protectable legal interests sufficient to require that he be heard on the question of production of his records, this Court focused on the question who did and who did not have access to the safe, obviously the central question in determining who was in possession of the safe's contents. This Court, in sustaining Guterma's claim of a constitutional privilege to certain of the records on the ground that it was Guterma who had the exclusive right of access, stated:

> "Most significant is Jacobs' lack of access to the safe. Assume that Jacobs complies with the subpoena to its maximum ability by delivering the safe to the grand jury room, it will still be Guterma who will have to deliver his own papers." *Id.* at 346.

In the case at bar, whether Meissner has any protectable constitutional interests, or any interest at all which he can assert as against the levy, is beside the point as concerns the preliminary question of how access to the box is legally obtained. The District Court, having exercised its naked power over respondent, and the latter having exhausted all its legal remedies, including an application to the United States Supreme Court*, Citibank was bound to comply with the order regardless of its ultimate adjudication, or risk contempt proceedings; *See,*

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* Respondents' application for a stay of the District Court's order was granted by the District Court conditioned upon Citibank posting a bond for an amount in excess of Meissner's tax liability, ignoring the fact that it was Meissner's tax liability that was at issue and not the bank's.

United States v. *United Mine Workers of America*, 330 U.S. 258, 291-294 (1947), or the threat of severe penalties under *United States* v. *Sterling National Bank & Trust Company*, 494 F.2d 919 (2d Cir. 1974).

Nevertheless, the government contends here, as it did in *Guterma*, that the party with the exclusive right of access is a mere "stranger" to the proceedings, and has no right to be heard. This Court held in *Guterma*, however, that ". . . to call Guterma a 'stranger' carries technical legalism beyond its outside limits." 272 F.2d at 345.

Whelpley v. *Knox*, 176 F.Supp. 936 (D. Minn. 1959), raised directly the question whether the party whose property rights were to be interfered with in a tax proceeding was indispensable to the suit. There, the taxpayer brought a proceeding against the District Director of Internal Revenue to obtain a release of certain tax liens against plaintiff's property. The District Court quite properly held that inasmuch as the effect of the release would be to extinguish tax liens belonging to the United States—and not to the Director of Internal Revenue —the United States was an indispensable party to the suit. In the case at bar, the right of access to the box is a property right of Meissner which is not shared by any other party, including Citibank. *Whelpley* is indistinguishable from the instant action on the question of Citibank's right to have its lessee joined in this proceeding.

Nor is Citibank's concern with its impressed role as a government functionary in the break-in academic face of Meissner's absence as a party to this proceeding, given the New York Court of Appeals' unanimous decision in *Roberts* v. *Stuyvesant Safe Deposit Co.*, 123 N.Y. 57 (1890). In *Roberts*, the Court of Appeals upheld plaintiff's right of action against the safe deposit company which had allowed the police to seize items in plaintiff's

safe deposit box where, although access to the box was properly obtained pursuant to a search warrant,* the police confiscated items not described therein. The point of the *Roberts'* decision, as it bears on the instant action, is that Citibank was unable to stand by as a stranger to these proceedings, but was forced to join the government in doing what it had expressly agreed not to do, and, since its boxholder was not a party to the proceeding and arguably not bound thereby, Citibank has had to assume the risk of claims by its customer should it later be determined that the government acted improperly and that Meissner suffered damages as a result.**

The IRS seeks to compel Citibank to "permit" access where the bank itself has no such right, while refusing to join in the proceeding the lessee who has the exclusive right of access. We submit that the lessee is an indispensable party to any proceeding, such as this one, where the question of access by a third party is to be determined.

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* Of course, in criminal proceedings against Meissner, access sought pursuant to a valid search warrant would have been entirely appropriate. *Roberts* v. *Stuyvesant Safe Deposit Co., supra.*

** In denying Meissner the right to intervene, the District Court appears to have ignored that part of the Federal Rules of Civil Procedure, Rule 19, which provides, in relevant part:

> "(a) Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) *leave any of the persons already parties subject to a substantial risk of incurring double* [liability]. . . ." (Emphasis added.)

III.

There is no authority for a summary proceeding without an action.

Petitioner, having chosen to invoke the jurisdiction of the federal court, promptly ignored the Rules governing its procedure. It ignored Rule 1 which provides that all civil suits are governed by the Federal Rules of Civil Procedure ("FRCP").* It ignored Rule 2 which provides for one form of action, and it ignored Rule 3 *et seq.* which govern the types of pleadings, time for service thereof and the manner in which litigation is to proceed. There is no authority whatever for a "summary proceeding"; a proposition which appeared well settled prior to this proceeding.

In *N. H. Fire Ins. Co.* v. *Scanlon,* 362 U.S. 404 (1960), the surety for a contractor commenced a summary proceeding in the United States District Court for the Southern District of New York to quash an IRS levy served on the City of New York for money due the contractor for construction of a playground. The United States Supreme Court in holding that plenary, and not summary, proceedings were the appropriate route for the surety company, made the following observation concerning summary proceedings:

> "Summary trial of controversies over property and property rights is the exception in our method of administering justice. Supplementing the constitutional, statutory, and common-law requirements for the adjudication of cases or controversies, the Federal Rules of Civil Procedure provide the normal course for beginning, conducting, and determining controversies. Rule 1 directs that the Civil Rules shall govern all suits of a

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* With certain exceptions not relevant. *See,* FRCP, Rule 81.

civil nature, with certain exceptions stated in Rule 81 none of which is relevant here. Rule 2 directs that 'There shall be one form of action to be known as "civil action." ' Rule 3 provides that 'A civil action is commenced by filing a complaint with the court.' Rule 56 sets forth an expeditious motion procedure for summary judgment *in an ordinary, plenary civil action.* Other rules set out in detail the manner, time, form and kinds of process, service, pleadings, objections, defenses, counterclaims and many other important guides and requirements for plenary civil trials. The very purpose of summary rather than plenary trials is to escape some or most of these trial procedures. Summary trials, as is pointed out in the petitioner's brief, may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even *ex parte.* Such summary trials, it has been said, were practically unknown to the English common law and it may be added that they have had little acceptance in this country. In the absence of express statutory authorization, courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law." *Id.* at 406-7. [Footnotes omitted.]

Indeed, the very question of summary proceedings as a useful and expedient adjunct to enforcement of the Internal Revenue laws, as the government argues, has met, prior to the instant action, with overwhelming judicial disapproval, as the following cases illustrate:

United States v. *Powell,* 379 U.S. 48 (1964), was a proceeding to enforce an IRS summons. The Court noted at p. 58, fn. 18: "Because § 7604(a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply. . . . The proceedings are instituted by filing a complaint, followed by answer and hearing."

Application of Howard, 325 F.2d 917 (3d Cir. 1963), involved an application to quash an IRS summons. The Court observed at p. 919: "We think this very recent decision of the Supreme Court [*N. H. Fire Ins. Co.* v. *Scanlon, supra*] precludes the substitution of summary procedure for plenary action. . . ."

In *Miller & Miller Auction, Inc.* v. *G. W. Murphy Indus., Inc.,* 472 F.2d 893 (10th Cir. 1973), a case involving questions of the priority of various liens, including two tax liens filed by the United States, the Court noted at p. 895: "There is no doubt the district court has jurisdiction *in a civil action* to render any judgment necessary to enforce the internal revenue laws. 26 U.S.C. § 7402(a) and 28 U.S.C. § 1340." [Emphasis added.]

Accord, Kennedy v. *Rubin,* 254 F.Supp. 190, 191-192 (N.D. Ill. E.D. 1966).

The foregoing cases are in accord with the views expressed by the leading authority on federal practice:

> "But if the summary proceeding is not ancillary to another action, or if the property in dispute is not within the custody and control of the court, then, in the absence of statute, a summary proceeding is not proper and any action must be properly commenced in accordance with Rule 3 [FRCP]." Moore, *Federal Practice,* § 3.04 at p. 714 (2d ed. 1974).

Indeed, a serious question exists as to the validity of the order appealed from which further exposes Citibank to the unwarranted risk of claims from third parties. Professor Moore has observed:

> "It is elementary, although sometimes overlooked, that an action must be properly commenced before a valid judgment or order can be entered therein, or provisional remedies obtained, where the defendant duly

raises the objection that the action was not properly commenced.'" *Id.* at pp. 712-713.

The footnote to that quotation cites the case of *Warren* v. *Arzt*, 18 F.R.D. 11 (S.D.N.Y. 1955). Warren, a seaman, petitioned the District Court by order to show cause, for review of an order of the Coast Guard withdrawing his seaman's papers. The government urged that the court lacked jurisdiction over the proceeding ". . . because it was started by the issuance of an order to show cause, rather than by the filing of a complaint." *Id.* at 12. The United States Attorney's position was readily accepted by the court, which held:

> "To commence an action, it is necessary that the Rules of Civil Procedure be complied with, that a complaint be filed, a summons issued, and service made as prescribed in the Rules. Any order to show cause would have to be ancillary to an action then pending.
>
> Since no action has ever been commenced or is pending in this Court, this Court obviously has no jurisdiction to act." *Id.* at 13.

The court vacated and set aside as "wholly void" the order to show cause.

Finally, it should be noted that the application of 26 U.S.C.A. § 7402, and 28 U.S.C.A. §§ 1340, 1345, upon which petitioner pins its hopes of sustaining this summary proceeding (10a), are each expressly limited to "civil actions".*

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* Indeed, the government on an earlier occasion appears to have placed the same interpretation on Section 7402. In *United States* v. *Mort Realty Corporation*, 177 F.Supp. 686 (E.D. Pa. 1959), the court noted at p. 687:

> "The United States, in its brief, points to section 7402 of the 1954 Internal Revenue Code [26 U.S.C.A. § 7402], as giving this Court jurisdiction *in civil actions* to issue writs and

(*footnote continued on following page*)

In view of the foregoing, it is apparent that maintenance of this summary proceeding has deprived Citibank of its right to defend, in a plenary action, the government's claimed right to access, despite the fact that the allegations made in its petition were placed in issue by the bank's answer and the jurisdictional defenses relating to the manner of this proceeding were properly set forth as separate defenses (17a-19a). Indeed, even in the context of a summary proceeding initiated by order to show cause,* the burden of proving the allegations in support of its petition remains on the moving party, *United States* v. *Peele Company*, 224 F. 2d 667, 669 (2d Cir. 1955), and thus the District Court erred in refusing to put the government to its proof in this proceeding.

The course adopted by the government is improper. As a result of the order below, Citibank is exposed to claims not only from its lessee for damages sustained by reason of "permitting" access to the box, but also from third parties whose property may be contained in the box.

(*footnote continued from preceding page*)

orders of injunction, etc., for the enforcement of the Internal Revenue laws." [Emphasis added.]

* No reason has ever been suggested as to why it was necessary to proceed summarily, on 11 days' notice, in violation of Rule (9)(c)(4) of the Local Rules of the District Court, and some 6 months after service of the Notice of Levy.

CONCLUSION

The petition and order to show cause should be dismissed; the inventory filed with the court destroyed, and the government relegated to a plenary action against the proper parties, if it so chooses.

Dated: New York, New York, June 6, 1975.

Respectfully submitted,

SHEARMAN & STERLING
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MATTHEW C. GRUSKIN
Of Counsel

UNITED STATES COURT OF APPEALS
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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 6th day of May, 1975, he served two copies of Brief of Respondent-Appellant on Hon. Paul M. Curran, U. S. Attorney, the attorney for Petitioner-Appellee by delivering to and leaving same with a proper person in charge of his office at U. S. Court House, Foley Square in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
6th day of May, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976